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MICHAEL RODAK

In the Supreme Court of the United States

October Term, 1973

No. 73-176

ARTHREE, INC., et al.,

Petitioners,

vs.

HOWARD KASKEL, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, THIRD DISTRICT

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MIAMI REVIEW — 371-4853 — 377-3721

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The petitioners, Arthree, Inc., et al., pray that a writ of certiorari issue to review the opinion and judgment of the District Court of Appeal, Third District, State of Florida.

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[1]The other petitioners are Robert Blum, Robert Rautbord, and Robert L. Turchin d/b/a The Carriage House Apartment Hotel and Yacht Club.

[2]The other respondents are Doris Kaskel, Carole Schragis and Anita Blum, as the ancillary co-executors of the Estate of Alfred I. Kaskel, deceased d/b/a Doral Beach Hotel and Fontainebleau Hotel Corp., a Florida corporation, State of Florida, Beverage Department.

OPINIONS BELOW

The opinion of the Florida District Court of Appeal, Third District, is reported in *City of Miami Beach v. Arthree, Inc.*, 269 So.2d 699 (3rd D.C.A. Fla. 1972).

JURISDICTION

The Supreme Court of Florida refused to review the District Court of Appeal, Third District, by denying conflict certiorari on March 13, 1973. The timely petition for rehearing to the Florida Supreme Court was denied on May 1, 1973. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

The petitioners who operate a hotel known as the Carriage House are attempting to preserve the right of their tenants to continue to operate various service stores located on the premises of the hotel. The respondents are seeking to prevent the further operation of those businesses located in petitioners' hotel on the grounds that those businesses are operating in violation of Section 4-D of Miami Beach City Ordinance No. 289 (app. 13, 21). The questions thereby arising are:

1. Whether the decision of Florida District Court of Appeal, Third District, in reversing the lower court judgment by holding that a city ordinance could discriminate in its impact and application between two essentially identical competing business entities is consistent with the Equal Protection Clauses of the Fourteenth Amendment.

2. Whether the application of City of Miami Beach Ordinance No. 289 to petitioners seeking to prevent the further operation of certain accessory uses while other competing area hotels of 100 or more guest rooms are allowed to maintain the same accessory uses is violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment Fourteen, Section 1:

> ; . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

The facts as herein presented will be drawn from the findings of fact as contained in the opinion of the trial court which was the Circuit Court in and for the Eleventh Judicial Circuit, Dade County, Florida and from the opinion of the Florida District Court of Appeal, Third District, with appropriate citations to each.

The petitioners own and operate as a business a large edifice located on the ocean side of Collins Avenue in the City of Miami Beach, Florida at 5401 Collins Avenue, known as the Carriage House Apartment Hotel and Yacht Club.

In its opinion, the trial court as a finding of fact determined that:

> . . . Carriage House does operate a bona fide hotel with all of the services that hotels normally provide to guests, that it always has and does maintain one hundred or more sleeping and guest room accommodations for transients and that it is recognized in the community as a hotel. (app. 10)

The trial court likewise added:

> . . . there is no genuine issue of any material fact as to the question of whether or not the Carriage House does operate a bona fide hotel containing one hundred or more sleeping and guest room accommodations. (app. 11)

The Florida District Court of Appeal, Third District, basically agreed with the findings of fact of the trial court stating that the Carriage House operates both as an apartment house for tenants and as a hotel for transient guests (app. 21, 22).

The City of Miami Beach ordinance number 289, Section 4-D, subsection 2 and 3, permits "hotels consisting of one hundred (100) or more guest rooms" to have certain accessory uses such as barber shops, clothing stores and the like (app. 13, 21).

Two of the respondents to this cause operate the Doral Beach Hotel and Fontainebleau Hotel which are located in the immediate vicinity of the Carriage House on the ocean

side of Collins Avenue and directly compete for customers with the Carriage House (app. 9). Each offers 100 or more guest rooms reserved for the use of its guests as does the Carriage House. Pursuant to City of Miami Beach ordinance number 289, section 4-D, subsections 2 and 3, both the Fontainebleau and Doral Beach Hotels are permitted to maintain certain accessory uses.

The Carriage House initiated the suit sub judice in the Circuit Court, Eleventh Judicial Circuit, Dade County, Florida to obtain a declaratory decree and injunctive relief to prevent the city from unconstitutionally applying the above ordinance to the Carriage House. Petitioners resisted in order to preserve the right of their tenants to remain in business (app. 9, 10). The Fontainebleau and Doral Beach Hotels joined the City as intervenors contending that the Carriage House was not a hotel offering more than 100 guest rooms and was not entitled under the ordinance to maintain its accessory uses.

The Circuit Court, Eleventh Judicial Circuit, Dade County, Florida entered its summary final judgment in favor of petitioners' holding the city ordinance to be violative of constitutional standards and in specific language stated:

> It is apparent that the Plaintiffs (Petitioners) in the instant case desire only to maintain stores and offices which are the same as the stores and offices maintained and permitted to be maintained, in the buildings of their immediate neighbors such as the Doral Beach Hotel, the Fontainebleau Hotel, and the others mentioned. Section 4-d of City of Miami Beach ordinance number

> 289 attempts to restrict the use of the premises of these Plaintiffs so as to prevent them from using them in a manner similar to the uses of their immediate neighbors, and, therefore, it is unreasonable, arbitrary, confiscatory and unconstitutional insofar as its application to these Plaintiffs is concerned. (Parenthetical supplied.) (app. 13).

An appeal was taken from the trial court's decision by the respondents to the Florida District Court of Appeal, Third District, on November 21, 1972; that court rendered its opinion reversing the judgment of the trial court on the grounds that the Carriage House had originally been conceived and constructed primarily as an apartment building with a few hotel rooms and regardless of the fact that it had significantly altered its functions to the extent that it was operating a bona fide hotel of 100 or more guest rooms, it could not change its status as an apartment house (app. 20). In so holding, the court advocated the theory that the external and internal physical form and shape of the building which housed the Carriage House was determinative of its status as a hotel instead of the current, valid, bona fide use to which the structure is applied. The zoning area in which petitioners' structure is located permits the operation of both hotels and apartment houses.

FEDERAL QUESTION

In 1968 the Constitution of the State of Florida was revised. Among the revised sections is Section 2 of Article I, "Basic Rights": "All natural persons are equal before the law . . . "

The 1885 constitution had stated that "all men are equal before the law . . . " This change in the wording from "all men" to "all natural persons" was intended by the drafters to exclude artificial "persons" or corporations from the protection of the Florida Constitution. For this reason, the question of equal protection to a corporation necessarily refers to the guarantee in Section 1 of the Fourteenth Amendment to the United States Constitution, rather than Article 1, Section 2 of the Florida Constitution —1968 Revision. The most current and comprehensive statement on this matter is contained in the concurring opinion of Justice Drew in case of *Faircloth v. Mr. Boston Distiller Corp.*, 245 So.2d 240, (Fla. 1970) at 249.

It is axiomatic that all references to equal protection of the laws as provided to Arthree, Inc. by the constitution refer to the United States Constitution rather than to the Florida Constitution.

Significant and substantive federal questions of Due Process and Equal Protection as the same are contained in the Fourteenth Amendment to the United States Constitution were raised by petitioners at every stage of the litigation in the state courts of Florida. These challenges based on the Fourteenth Amendment formed the basis of petitioners' legal position. In the initial pleadings filed by petitioners in the case sub judice full reliance was placed upon the protection granted by Federal Due Process and Equal Protection standards. In particular the Carriage House alleged that the classifications sought to be imposed upon them was arbitrary, unreasonable and denied them equal protection and due process under the law.

The opinion of the trial judge was predicated upon a consideration of the federal question in ruling "all the Carriage House wants is to be treated as are 'other' area 'hotels' . . . the ordinance is confiscatory and unconstitutional as it applies to the plaintiff." (app. 13).

The Florida District Court of Appeal, Third District was forced to consider the Federal question in reversing the trial court. It decided that the application of the ordinance was not violative of the petitioners' Fourteenth Amendment rights because the court theorized that the physical structure housing the petitioners' business was originally conceived primarily as an apartment house and that regardless of the fact that petitioners were operating a bona fide hotel, they were not classified as a hotel under the ordinance and could be discriminated against by denying them privileges extended to competing area hotels, including the intervenor hotels (app. 26).

The District Court of Appeal was the highest Florida court to pass upon the merits of the case and to consider the Federal question. The Florida Supreme Court denied conflict certiorari.

REASONS FOR GRANTING THE WRIT

This case provides a fundamental example of one of the most blatant forms of invidious economic discrimination. The undisputed facts as determined by both the trial court which ruled in favor of the petitioners, and the Florida District Court of Appeal, Third District, established that the Carriage House does operate a bona fide hotel offering more than 100 rooms for transient guests. The only factor which distinguishes the operation of the Carriage

House from that of their neighboring hotels, Fontainebleau and Doral Beach, is that the Carriage House original architectural design, contemplated an apartment house with a few hotel rooms. The record is clear that the Carriage House has always operated as a bona fide hotel. It was duly licensed as a hotel by two Florida State Agencies, Division of Beverage and Division of Hotels and Restaurants, Department of Business Regulation. It is recognized in the community as a hotel. The City of Miami Beach has repeatedly affirmed its status as a hotel through the official and quasi-official acts of its various departments, such as, for example, the Tourist and Development Authority. While it is true that the Carriage House still accommodates a great number of permanent residents, this in no fashion detracts from its being a bona fide hotel.

The decision of the Florida District Court of Appeal, Third District constitutes a violation of the principal enunciated by this Court in the case of *Cotting v. Godard*, 183 US 79 (1901). This court clearly stated, at page 112:

> . . . we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other. . . .

In the case *sub judice*, the Carriage House merely desires to be afforded the same legal privileges extended to other hotels in its immediate vicinity. This court's mandate in *Cotting, supra* is clear in its denunciation of arbitrarily imposed economic discrimination and in its in-

sistance upon equal treatment among parties engaged in the same kind of business and under the same conditions.

The questions presented are one of importance to the tourist-accommodation industry not only in Florida but nationally. As that industry attempts to mould its form and function to meet the increasing and varied demands of a growing leisure oriented society, new motifs and methods are constantly evolving. Many new responses may not conform strictly to establish definitions of hotel, motel, etc. Many offer varied services not traditionally associated with past standards. It is urged that in all cases the substance of these operations must be examined to determine their true nature. It is difficult to comprehend the force of logic which purports to establish as the law of this land that the physical shell housing a business is the determining factor in ascertaining the nature of the business activity so contained. It is incomprehensible to advocate such a theory as a justification for distinguishing between competing factions in the business community which are virtually identical in other respects. Such a determination can only be considered totally arbitrary and a clear abridgment of constitutional guarantees. The inevitable effect is to grant a privileged status to a few favored businesses bestowing upon them a decided and significant competitive advantage.

CONCLUSION

The uncontroverted fact remains that whatever else the Carriage House is, it is definitely a hotel of 100 or more guest rooms and under the protection of Section 1 of the Fourteenth Amendment is entitled to enjoy the same privileges extended to other neighboring hotels of 100 or more rooms.

Respectfully submitted,

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and

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for a Writ of Certiorari to the District Court of Appeal of the State of Florida, Fourth District and Appendix has been served upon each of the following:

LIONEL BARNET
Assistant City Attorney
1130 Washington Avenue
Miami Beach, Florida 33139

SIBLEY, GIBLIN, LEVENSON & WARD
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JOSEPH A. WANICK
City Attorney
City of Miami Beach
Miami Beach, Florida

attorneys for respondents, by mail, this _____ day of _____, 1973.

_____
Attorney for Petitioners

APPENDIX A

Judgement and Opinion Below

ORDER GRANTING SUMMARY JUDGMENT AND SUMMARY FINAL JUDGMENT

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO: 70-338 (Vann)

ARTHREE, INC., et al.,

Plaintiffs,

-v-

CITY OF MIAMI BEACH, etc.,

Defendant.

HOWARD KASKEL, et al.,

Plaintiff-Intervenors,

-v-

ARTHREE, INC., et al.,

Defendants.

THIS CAUSE came on to be heard before me, after due notice, on the Plaintiffs' Motion for Summary Judgment against the Defendant and the Plaintiff-Intervenors. The Court having considered the pleadings, depositions,

affidavits, exhibits, the original Court file in the case of Kaskel -v- City of Miami Beach, Circuit Court case number 62C10862 and having heard extensive argument of counsel and being otherwise fully advised in the premises the Court finds as follows:

The Plaintiffs own and operate a luxury hotel and apartment complex known as the Carriage House located at 5401 Collins Avenue (which is on the ocean side of Collins Avenue) in the city of Miami Beach, Dade County, Florida. The Plaintiff-Intervenors operate the Doral Beach Hotel and the Fontainebleau Hotel respectively. Both of said hotels are also located on the ocean side of Collins Avenue. The Doral Beach Hotel is located at 4833 Collins Avenue and the Fontainebleau Hotel at 4441 Collins Avenue, both in the city of Miami Beach, Dade County, Florida.

From the pleadings and statements made in open Court at the time of the hearing on the Motion for Summary Judgment the positions of the parties are as follows: The Plaintiffs maintain that they are operating a bona fide hotel with one hundred or more sleeping and guest room accomodations and thus are entitled to maintain on the premises certain stores and offices as accessory uses similar in nature to other hotels in the same vicinity. The Defendant and the Plaintiff-Intervenors deny this. However, at the hearing on the Motion for Summary Judgment the attorney for the Plaintiff-Intervenors conceded that if the Carriage House did in fact operate a bona fide hotel with one hundred or more sleeping and guest room accomodations, it would be entitled to the accessory uses which are found in other hotels in the vicinity including the hotels operated by the Plaintiff-Intervenors.

Additionally, the Plaintiff-Intervenors maintain that the Carriage House should not be permitted to have a liquor license.

Numerous affidavits with voluminous exhibits have from time to time been submitted to the Court by the Plaintiff. These affidavits, exhibits and the Plaintiffs' answers to interrogatories show that the Carriage House does operate a bona fide hotel with all of the services that hotels normally provide to guests, that it always has and does maintain one hundred or more sleeping and guest room accomodations for transients and that it is recognized in the community as a hotel. In fact, some of the exhibits submitted with affidavits, contained correspondence from the Tourist Development Authority, which is an agency of the City of Miami Beach, which praised the hotel facilities of the Plaintiffs. In addition, there were items of correspondence and contracts between the Tourist Development Authority and the Carriage House requesting and confirming the availability of blocks of rooms for conventioneers coming to the City of Miami Beach. There were other affidavits and exhibits submitted by the Plaintiffs, all of which support their position. The Defendant and Plaintiff-Intervenors filed no opposing affidavits or exhibits and the depositions on file do not raise any genuine issue of material fact. Therefore, the Court has accepted the affidavits and exhibits as true and finds that there is no genuine issue of any material fact as to the question of whether or not the Carriage House does operate a bona fide hotel containing one hundred or more sleeping and guest room accomodations.

The record shows without controvention that the Plaintiffs were duly licensed by the Division of Beverage,

Department of Business Regulation, State of Florida for the sale and consumption on premises of alcoholic beverages, and that the Plaintiffs have complied with the requirements of the Division of Hotels and Restaurants, Department of Business Regulation of the State of Florida.

Insofar as the second proposition is concerned, that is, whether or not the Carriage House should be restricted to the accessory uses set forth in section 4-d of ordinance number 289, or whether the Carriage House should be permitted the accessory uses found in other hotels in the vicinity, the uncontroverted affidavit of John Lukacs contains a report of a survey done by him of various accessory uses in hotels in the vicinity of the Carriage House. He surveyed five hotels, including the hotels of the Plaintiff-Intervenors and the hotel of the Plaintiffs, all of which hotels are situated in close proximity to each other, on the ocean side of Collins Avenue. The survey shows that each of the accessory uses found in the Carriage House can also be found in at least one, and usually more of the other hotels in the vicinity.

The history surrounding the accessory uses in question is well documented in the courts. The Fontainebleau Hotel, operated by one of the Plaintiff-Intervenors, contains the accessory uses found in paragraph 9 of John Lukacs' affidavit. These accessory uses are permitted by virtue of the decision in Charnofree Corporation -v- City of Miami Beach, 76 So.2d 665 (Fla. 1954). The accessory uses found in the hotel of the other intervenor, the Doral Beach Hotel, which are listed in paragraph 11 of the Lukacs affidavit, and the accessory uses found in the Playboy Plaza Hotel, which are listed in paragraph 12 of the Lukacs affidavit, also exist by virtue of litigation against the City of Miami

Beach, the history of which is as follows: In the case of Kaskel -v- City of Miami Beach, case number 62C10862 in the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida, the original Court record of which was before this Court at the time of the Motion for Summary Judgment in the instant case, one of the Plaintiff-Intervenors in this case, Kaskel, and later, as an intervenor in that case, the owners and operators of the Statler Hilton Plaza Hotel (now called the Playboy Plaza Hotel) sought to have accessory uses which the city claimed were prohibited by virtue of section 4-d of ordinance number 289. Both the Doral Beach Hotel and the Statler Hilton Plaza Hotel are situated in the same zoning district as the Carriage House. Ultimately, Judge Raymond G. Nathan entered a final decree on a Motion for Summary Judgment in favor of those Plaintiff hotels and against the City of Miami Beach. He held that those Plaintiffs were entitled to a decree permitting them to have more liberal accessory uses, using the uses permitted in the Fontainebleau Hotel as the guide, and relying upon Charnofree -v- City of Miami Beach, supra. The City appealed and Judge Nathan's decision was affirmed on the authority of the Charnofree case. City of Miami Beach -v- Kaskel, 223 So.2d 364 (Fla. 3d Dist. 1969). The Supreme Court of Florida denied the City of Miami Beach's petition for certiorari without opinion. City of Miami Beach -v- Kaskel, 232 So.2d 176 (Fla. 1969).

It is apparent that the Plaintiffs in the instant case desire only to maintain stores and offices which are the same as the stores and offices maintained and permitted to be maintained, in the buildings of their immediate neighbors such as the Doral Beach Hotel, the Fontainebleau Hotel, and the others mentioned. Section 4-d of City

of Miami Beach ordinance number 289 attempts to restrict the use of the premises of these Plaintiffs so as to prevent them from using them in a manner similar to the uses of their immediate neighbors, and, therefore, it is unreasonable, arbitrary, confiscatory and unconstitutional insofar as its application to these Plaintiffs is concerned.

Accordingly, the Court finds that there are no genuine issues of any material fact and that the Plaintiffs are entitled to a summary judgment as a matter of law both as to its complaint against the Defendant CITY OF MIAMI BEACH and as to the complaint of the Plaintiff-Intervenors, HOWARD KASKEL, DORIS KASKEL, CAROLE SCHRAGIS and ANITA BLUM, as the ancillary co-executors of the Estate of Alfred I. Kaskel, Deceased, d/b/a DORAL BEACH HOTEL, and FONTAINEBLEAU HOTEL CORP., a Florida corporation. It is thereupon

ORDERED, ADJUDGED AND DECREED as follows:

1. That the Plaintiffs' Motion for Summary Judgment is hereby granted in favor of the Plaintiffs, ARTHREE, INC., a Florida corporation, and ROBERT BLUM, ROBERT RAUTBORD and ROBERT L. TURCHIN, d/b/a THE CARRIAGE HOUSE APARTMENT HOTEL AND YACHT CLUB and against the Defendant, CITY OF MIAMI BEACH.

2. That the Plaintiffs' Motion for Summary Judgment is hereby granted in favor of the Defendants in Intervention, ATHREE, INC., a Florida corporation, and ROBERT BLUM, ROBERT RAUTBORD and ROBERT

L. TURCHIN, d/b/a THE CARRIAGE HOUSE APARTMENT HOTEL AND YACHT CLUB; and CITY OF MIAMI BEACH, a municipal corporation; and STATE BEVERAGE DEPARTMENT OF FLORIDA and against the Plaintiff-Intervenors, HOWARD KASKEL, DORIS KASKEL, CAROLE SCHRAGIS and ANITA BLUM, as the ancillary co-executors of the Estate of Alfred I. Kaskel, Deceased, d/b/a DORAL BEACH HOTEL, and FONTAINEBLEAU HOTEL CORP., a Florida corporation and that the Intervenor's complaint is hereby dismissed with prejudice and the Defendants in Intervention shall go hence without day.

3. That the Defendant, CITY OF MIAMI BEACH, its officials, representatives, and administrative officials, be and they are each and all hereby permanently restrained and enjoined from enforcing the restrictive provisions of section 4-d of City of Miami Beach ordinance number 289 against the Plaintiffs and/or their tenants. This injunction is applicable only to those provisions of section 4-d of City of Miami Beach ordinance number 289 that limit the accessory uses permissible on the Plaintiffs' premises so as to prohibit them from having accessory uses similar to those which are permitted on the premises of its neighbors and, specifically, the Fontainebleau Hotel, the Doral Beach Hotel, the Playboy Plaza Hotel and the Eden Roc Hotel.

4. That the Defendant, CITY OF MIAMI BEACH, by and through its appropriate offices, representatives, and/or administrative officials, be and it is hereby ordered to issue to the Plaintiffs and/or the tenants of the Plaintiffs, such licenses and permits as may be required or necessary for the operation and conduct upon the Plaintiffs' premises, such stores and service facilities and other busi-

ness operations as are commensurate with the operation of the Plaintiffs' hotel and specifically the accessory uses permitted by virtue of paragraph 3 of this Final Judgment. This provision is conditioned upon proper presentation by the Plaintiffs and/or their tenants to the Defendant CITY OF MIAMI BEACH of properly executed applications for such licenses, together with payment of the prescribed fees and charges for such licenses and/or permits required by the Defendant CITY OF MIAMI BEACH.

5. That the Defendant, CITY OF MIAMI BEACH, its officers, representatives, and administrative officials, be and they are each and all hereby permanently enjoined from enforcing or attempting to enforce any ordinance, rule or regulation which in any way interferes with the provisions of this judgment and the rights of the Plaintiffs to operate their business and to have operated on their premises the accessory uses permitted by paragraph 3 of this Final Judgment.

6. That the Defendant, CITY OF MIAMI BEACH, caused to be issued certain "Summonses to Appear" dated January 7, 1970 and each of them bearing complaint number 26358, charging the Plaintiffs and certain of their tenants with violations of section 4-d of City of Miami Beach ordinance number 289. Copies of those "Summonses to Appear" were attached to the Plaintiffs' Amended Complaint as composite exhibit "B". Those "Summonses to Appear" are hereby quashed and the Defendant, CITY OF MIAMI BEACH, its officers, representatives, administrative officials, be and they are each and all hereby permanently enjoined from enforcing or attempting to enforce or prosecuting or attempting to prosecute those "Summonses to Appear".

7. The Plaintiffs shall be entitled to such costs expended against both the Defendant and the Plaintiff-Intervenors as the Court may determine upon proper application.

DONE AND ORDERED at Miami, Dade County, Florida this 30 day of August, 1971.

/s/

CIRCUIT COURT JUDGE

APPENDIX B

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION
AND, IF FILED, DISPOSED OF.

Judgment and Opinion Below

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

CASE NO. 72-36

JULY TERM, A. D. 1972

CITY OF MIAMI BEACH, a municipal corporation created and existing under the laws of the State of Florida,

Appellant,

vs.

ARTHREE, INC., a Florida corporation, and ROBERT BLUM, ROBERT RAUTBORD, and ROBERT L. TURCHIN d/b/a THE CARRIAGE HOUSE APARTMENT HOTEL AND YACHT CLUB,

Appellees.

CASE NO. 72-90

HOWARD KASKEL, DORIS KASKEL, CAROLE SCHRAGIS and ANITA BLUM as the ancillary co-executors of the Estate of Alfred I. Kaskel, deceased, d/b/a DORAL BEACH HOTEL, and FONTAINEBLEAU HOTEL CORP., a Florida corporation,

Appellants,

vs.

ARTHREE, INC., a Florida corporation, and ROBERT BLUM, ROBERT RAUTBORD and ROBERT L. TURCHIN, d/b/a THE CARRIAGE HOUSE APARTMENT HOTEL AND YACHT CLUB; and CITY OF MIAMI BEACH, a municipal corporation; and STATE BEVERAGE DEPARTMENT OF FLORIDA,

Appellees.

Opinion filed November 21, 1972.

Appeals from the Circuit Court for Dade County, Harold R. Vann, Judge.

Joseph A. Wanick, City Attorney and Lionel Barnet, Assistant City Attorney, for the City of Miami Beach; Sibley, Giblin, Levenson & Ward, for Kaskel, et al., appellants.

Herbert M. Klein, for the State Beverage Department of Florida; Kovner, Mannheimer, Greenfield & Cutler and Stephen J. Rose, for all other appellees.

Before PEARSON, CHARLES CARROLL and HENDRY, JJ.

PEARSON, Judge

This is a consolidated appeal brought by the defendant City of Miami Beach and certain intervenors asking review of a summary final judgment entered in favor of the plaintiffs in a declaratory judgment action. The intervenors operate two luxury hotels on the Miami Beach oceanfront; the plaintiffs-appellees operate a building complex known as the Carriage House Apartment Hotel in the same area. The defendant City and the intervenors both urge reversal of the summary final judgment holding that certain provisions of a Miami Beach zoning ordinance are unconstitutional as applied to the plaintiffs-appellees. The issue presented to the trial court was whether the Carriage House Apartment Hotel was entitled to maintain service stores and offices such as are allowed in hotels of over one hundred rooms on the Miami Beach oceanfront hotel strip. We reverse and remand with directions to enter a judgment for the City of Miami Beach.

The amended complaint prayed that the court declare the City's zoning ordinance unconstitutional in its entirety, or, in the alternative, that the court declare the zoning ordinance unconstitutional as applied to the plaintiffs, or, as second alternative, that the court find that the City is estopped by its previous actions from prohibiting the plaintiffs from having the service facilities.

In its answer, the City denied that the plaintiffs were entitled to the relief requested and, furthermore, prayed the court to enjoin the owners and operators of the Carriage House "from conducting illegal uses upon the premises of said apartment building thereby directing the revocation or the withholding of any licenses or permits which allow such illegal uses." The intervenors' complaint stated that they were neighbors and competitors of the Carriage House,

and in addition to reiterating the position expressed in the City's answer, prayed for further relief against the Department of Business Regulation, Division of Beverage, State of Florida. In its answer, the Department of Business Regulation essentially took the position that the plaintiff's liquor license had been issued pursuant to the provisions of the Beverage Law, Fla.Stat. §561.20(2), F.S.A., and that it "was done after proof of compliance with the Ordinances of the City of Miami Beach; and approved by the Official of Miami Beach authorized to submit such an approval."

The intervenors filed a motion for summary judgment which was denied by the court. Subsequently, the plaintiffs filed their motion for summary judgment. After a hearing on the motion, the court entered its order granting summary final judgment in favor of the plaintiffs and against the defendant City and the intervenors, and found that the zoning ordinance in question, Ordinance No. 289, section 4-D, was "unreasonable, arbitrary, confiscatory and unconstitutional" as applied to the plaintiffs. Consequently, the trial court held that the Carriage House Apartment Hotel was entitled to operate all of the service stores, offices, and other accessory uses allowed to oceanfront hotels in the area. The defendant and the intervenors have appealed from the summary final judgment.

Although the proceedings have been lengthy and complicated, there is actually only one issue in dispute between the parties, and that issue is whether appellees' apartment hotel is required by law to be treated as a hotel for the purposes of determining whether it may operate service stores, offices, and other accessory uses which oceanfront hotels are permitted to operate in the City of Miami Beach. The

plaintiffs initiated litigation in the trial court seeking a declaration that since the City had recognized and treated the building complex as a hotel, that it was therefore entitled to the zoning privileges of a hotel. The City maintains that the Carriage House is not entitled to the zoning privileges because it is not actually a hotel as defined by the ordinance. The intervenors are competitors of the Carriage House. They maintain that the Carriage House has not and cannot change its character from an apartment house with a few hotel rooms, to a bona fide hotel entitled to service stores, offices, and other accessory uses. The pivotal holding of the trial court on the motion for summary judgment states:

******

> "It is apparent that the Plaintiffs in the instant case desire only to maintain stores and offices which are the same as the stores and offices maintained and permitted to be maintained, in the buildings of their immediate neighbors such as the Doral Beach Hotel, the Fontainebleau Hotel, and the others mentioned. Section 4-d of City of Miami Beach ordinance number 289 attempts to restrict the use of the premises of these Plaintiffs so as to prevent them from using them in a manner similar to the uses of their immediate neighbors, and, therefore, it is unreasonable, arbitrary, confiscatory and unconstitutional insofar as its application to these plaintiffs is concerned."

******

The City of Miami Beach urges that there are genuine issues of material fact and that the summary judgment must be reversed. The intervenors maintain that a

summary judgment was proper but that the court simply misapplied the controlling law and that the law, if properly applied, requires that a summary judgment be entered for the defendant City and plaintiffs-intervenors. Our review of the record convinces us that there are some issues of fact but that these issues are not genuine issues of material fact.

The Carriage House, which is operated by the appellees, is located on the ocean side of Collins Avenue in Miami Beach, Florida. The intervenors operate the Doral Beach Hotel and the Fontainebleau Hotel which are also located nearby on the oceanfront. All of these structures are located in a zoning area REA, a multi-family district which allows hotels, . . . apartment houses, and apartment hotels. Ordinance No. 289, section 4-D, subsection 4, provides that hotels "consisting of one hundred (100) or more guest rooms" may have certain accessory uses. Some of the accessory uses which have been allowed by the City under subsection 4 include a stock broker's office, a sundry shop, an art gallery shop, a beauty salon, an antiques and accessories shop, a ladies' wear shop, a photography studio, a men's wear shop, and a barber shop. A portion of the text of the Beverage Law, Fla.Stat. § 561.20(2), F.S.A., also makes provision for hotels containing more than one hundred rooms. The text essentially provides that such hotels are entitled to apply to the Department of Business Regulation, Division of Beverage, in order to obtain a liquor license.

The Carriage House operates both as an apartment house for tenants and as a hotel for transient guests. It has several hundred apartments of different types and has thirty rooms which are designed specifically as hotel rooms.

For business reasons, the Carriage House has used additional apartments for the housing of transient guests. The record shows that these extra hotel accommodations have been important to the City of Miami Beach. Several times when conventions were planned or in progress, agencies of the City of Miami Beach requested the Carriage House as a hotel to provide more than thirty rooms for the use of conventioneers. In order to efficiently administer its expanded hotel business, the Carriage House has designated more than one hundred of its units as hotel units for the use of transient guests. To this extent, the Carriage House is recognized in the community as a hotel. The shops and services which the Carriage House has installed are the same shops and services as are in other area hotels.

A study of the arguments of the contending parties reveals a fundamental difference in their approach to the problem. The appellants urge that in determining whether a building is a hotel, an apartment house, or an apartment hotel, the court should be governed by the structure of the building itself. On the other hand, the appellees urge that the determination should be made upon the basis of the valid use being made of the building at the time of the application for accessory uses. The trial court, in reaching its decision, adopted the latter view. In so holding, the court stated:

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"Therefore, the Court has accepted the affidavits and exhibits as true and finds that there is no genuine issue of any material fact as to the question of whether or not the Carriage House does operate a bona fide hotel containing one hundred or more sleeping and guest room accomodations [sic]."

******

Ordinarily, in determining the meaning and application of an ordinance, the definitions provided by the ordinance itself are a matter of first consideration. The ordinance under attack is Ordinance No. 289 of the City of Miami Beach as amended to March 1, 1969.[1] The ordinance contains the following salient definitions:

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"APARTMENT: A dwelling designed for occupancy otherwise than as a one-family dwelling, or a two-family dwelling. The term 'Multiple Dwelling' shall be understood to include apartment houses, bungalow courts, and all other family dwellings of similar character, but not to include hotels or apartment hotels.

"APARTMENT HOTEL: An apartment building, under resident supervision, which maintains an inner lobby through which all tenants must pass to gain access to the apartments and which may furnish dining room service for tenants only."

******

No definition appears in the portions of the ordinance introduced into evidence for the term "hotel." However, in section 4-D, sub-section 4, the following appears:

[1]We are informed that the City of Miami Beach has passed a new zoning ordinance which became effective October 13, 1971. This zoning ordinance may have additional definitions which will clarify its application in the future. However, since the new zoning ordinance became effective after the date of the trial court's final judgment herein, it will not be further considered.

******

"4. Hotels consisting of one hundred (100) or more guest rooms may contain cabarets, club cabaret and the following service facilities, to wit: Dance studios, barber shops, beauty shops, dining rooms, restaurants, coffee shops, tobacco, magazine, newspaper and drug sundry shops, and valet service facilities for guests of the hotel only, . . .".

******

We are impressed with the fact that the essential difference between a hotel and an apartment hotel is that the primary business of a hotel is to provide furnished rooms for transient guests while an apartment hotel provides accommodations with kitchen and housekeeping facilities for more permanent tenants. The State of Florida has enacted legislation which includes a recognition of this distinction. Fla.Stat. § 509.242(1)(a)(b), F.S.A., defines the terms "hotel" and "apartment hotel" as follows:

"(a) Hotel. — Any building or group of buildings containing sleeping room accommodations for twenty-five or more guests and providing the services generally provided by a hotel and recognized as a hotel in the community in which it is situated, or by the industry, is declared to be a hotel.

"(b) Apartment hotel. — Any establishment which meets the requirements of a hotel, but also has units with kitchen equipment and housekeeping facilities, is declared to be an apartment hotel."

With these distinctions in mind, it is both logical and useful for the City to legislate that hotels may operate service facilities for transient guests which are not as essential to more permanent tenants of an apartment hotel. If, as the appellees contend, zoning distinctions should be enforced based only on the current use of a particular building, then it will become impossible to draw a distinction between a hotel and an apartment hotel. There is no dispute that the Carriage House was structurally and architecturally planned as an apartment complex with thirty hotel rooms. As far as the record shows, there has been no structural change in the building or in its rooms, and thus the only change involves the Carriage House using some of its apartments as hotel rooms. The fact that it now regularly utilizes these apartments as hotel rooms does not alter the fact that the change is simply one of business policy, a change that could be reversed at any time.

In light of the definitions contained in Ordinance No. 289 and in Fla.Stat. § 509.242 (1) (a) (b), F.S.A., and in view of the fact that the applicability of zoning provisions must have some permanence, we think that the determination of whether a given building is an apartment hotel or a hotel must be made upon the basis of the structure rather than upon changes in the building's use.

If it is accepted that there is a proper legislative distinction between apartment hotels and hotels as set forth in the ordinance, then, in the light of that distinction, we should examine the trial judge's conclusion that it is unreasonable and unconstitutional to restrict the accessory uses on the premises of the appellees' apartment hotel when their immediate neighbors, the intervenor hotels, are allowed the same accessory uses. Once it is accepted that a

proper legislative distinction exists, the question then becomes whether there is a logical connection between the exercise of the police power through zoning regulation for the public welfare, and the restriction of service stores and other accessory uses to hotels. We have previously considered that question and held that there is a reasonable relationship between the public welfare and an ordinance which prohibits service stores in apartment houses, Oceancoast Corp. v. City of Miami Beach, Fla.App. 1967, 203 So.2d 640, 643. We adhere to that holding, and therefore hold that the trial judge mistakenly applied the applicable law in the judgment which is appealed.

The appellees' remaining legal position urges that since the City of Miami Beach has recognized the Carriage House as a hotel, the City is now estopped to deny the Carriage House the accessory uses of a hotel. Although this argument was not adopted by the trial judge in his judgment, it must be considered nevertheless. The appellees insist that the City cannot blow hot and cold at the same time, and that a court of equity ought not allow the City to enforce its zoning ordinance so as to deprive the Carriage House of the accessory uses, while the City recognizes that the Carriage House performs the functions of a hotel. Although the argument seems at first examination to follow fair play and justice, we think that it does not create a basis for a court order preventing the City from exercising its police power. In order to intelligently consider the effect of the application of the doctrine of estoppel to the action of a city, we must take judicial cognizance of the fact that a modern city consists of many departments performing varied functions for its citizens. It is not always possible for the right hand to know what the left hand is doing. Therefore, the legally binding actions of a city are usually those of its council or

governing body. The appellees argue that the City recognized the Carriage House as a hotel when the City's Convention Bureau requested the Carriage House to reserve more than thirty rooms for various organizations planning conventions on Miami Beach, and when the City's Tourist Development Authority sent the Carriage House a congratulatory letter on its hospitality as a hotel. However, the actions of the City's Convention Bureau and Tourist Development Authority cannot be equated with the legally binding legislative action of the City itself as expressed by the Miami Beach City Council when it passed Ordinance No. 289. It is a prerogative of a city to exercise its police power by enforcing its duly enacted zoning ordinances. Under these circumstances, we hold that the City of Miami Beach is not estopped to enforce Ordinance No. 289 because of the actions of its employees. See Dade County v. Bengis Associates, Inc., Fla.App. 1972, 257 So.2d 291; Greenhut Construction Company v. Henry A. Knott Inc., Fla.App. 1971, 247 So.2d 517; City of Miami Beach v. Meiselman, Fla.App. 1968, 216 So.2d 774.

In light of this analysis, we hold that the summary final judgment entered in favor of the plaintiffs-appellees must be reversed, and the trial court is directed to enter a judgment for the appellant City. We further hold that it does not appear without genuine issue of material fact that the plaintiffs-intervenors are entitled as a matter of law to a judgment against the Board of Business Regulation of the State of Florida. Accordingly, the trial court is directed to take such further action as it may deem necessary to determine the issue between the plaintiffs-intervenors and the Board of Business Regulation of the State of Florida.

Reversed and remanded with directions.

HENDRY, J., dissents.

APPENDIX C

Stay Order of Florida Supreme Court

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1973
MONDAY, MAY 14, 1973

CASE NO. 43,233

ARTHREE, INC., ETC., ET AL.,
Petitioners,

vs.

HOWARD KASKEL, ET AL.,
Respondents.

Petitioners' motion for further stay is granted and proceedings in this Court, the District Court of Appeal, Third District, and in the trial court are hereby stayed to and including August 1, 1973 to enable petitioner to seek

review in the Supreme Court of the United States and to obtain any further stay from that Court.

Y

CC: Ervin, Varn, Jacobs & Odom
(Hon. Joseph C. Jacobs,
Hon. Davisson F. Dunlap, Jr.)
Kovner, Mannheimer, Greenfield,
& Cutler
(Hon. Steven J. Rose)
Hon. Lionel Barnet
Sibley, Giblin, Levenson & Ward
Hon. Herbert M. Klein
Hon. Joseph A. Wanick
Hon. W. P. Carter, Clerk
Hon. E. B. Leatherman, Clerk

A True Copy
TEST:
Sid J. White
Clerk Supreme Court.
By: Kay D. Yent, D.C.

SUPREME COURT OF FLORIDA
JANUARY TERM, A.D. 1973
TUESDAY, MARCH 13, 1973

CASE NO. 43,233

DISTRICT COURT OF APPEAL, THIRD DISTRICT

ARTHREE, INC., ETC., ET AL.,
Petitioners,

vs.

HOWARD KASKEL, ET AL.,
Respondents.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5c(6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

CARLTON, C. J., ADKINS, BOYD, McCAIN and DEKLE, J. J., concur

A True Copy
TEST:
Sid J. White
Clerk Supreme Court.
By: Kay D. Yert, D.C.

Y

CC: Hon. W. P. Carter, Clerk
Hon. E. B. Leatherman, Clerk
Hon. Harold R. Vann, Judge
Ervin, Varn, Jacobs & Odom
(Hon. Joseph C. Jacobs;
Hon. Davisson F.
Dunlap, Jr.)
Kovner, Mannheimer,
Greenfield & Cutler
(Hon. Steven J. Rose)
Hon. Joseph A. Wanick
Sibley, Giblin, Levenson &
Ward
(Hon. Marion E. Sibley)

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A.D. 1973
TUESDAY, MAY 1, 1973

CASE NO. 43,233

ARTHREE, INC., ETC., ET AL.,
Petitioners,

vs.

HOWARD KASKEL, ET AL.,
Respondents.

On consideration of the petition for rehearing filed by attorneys for petitioner,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

CARLTON, C. J. ADKINS, BOYD and DEKLE, J. J., concur
McCAIN, J., dissents

A True Copy
TEST:
/s/ Sid J. White
Clerk Supreme Court.

cc: Messrs. Ervin, Varn, Jacobs & Odom
Messrs. Kovner, Mannheimer, Greenfield & Cutler
Honorable Joseph A. Wanick
Messrs. Sibley Giblin, Levenson & Ward
Honorable William P. Carter
Honorable E. B. Leatherman
Honorable Harold R. Vann

(THE ORDER OF MARCH 13, 1973, HAS BEEN MAILED TO THE CLERK OF THE THIRD DISTRICT COURT OF APPEALS.)

AUG 21 19
MICHAEL RODAK, JR.

in the Supreme Court of the United States

OCTOBER TERM, 1973

CASE NO. 73-176

ARTHREE, INC., et al.,

Petitioners,

vs.

HOWARD KASKEL, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

MARION E. SIBLEY
and
ALLAN M. GLASER
of the law firm of
SIBLEY, GIBLIN, LEVENSON
& WARD
Attorneys for Respondents Howard Kaskel, Doris Kaskel, Carole Schragis, Anita Blum, as the ancillary co-executors of the Estate of Alfred I. Kaskel, deceased, d/b/a Doral Beach Hotel, and the Fontainebleau Hotel Corp., a Florida corporation.
605 Lincoln Road, Suite 707
Miami Beach, Florida 33139

MIAMI REVIEW — 371-4853 — 377-3721

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in the

Supreme Court

of the

United States

OCTOBER TERM, 1973

CASE NO. 73-176

ARTHREE, INC., et al.,

Petitioners,

vs.

HOWARD KASKEL, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

INTRODUCTION

The Petitioners,[1] owners and operators of the Carriage House Apartment Hotel and Yacht Club, seek review of an opinion of the District Court of Appeal of Florida, Third District, recorded in **Arthree, Inc. vs. City of Miami Beach,** 269 So.2d 699 (3rd D.C.A., Fla. 1972). The Petitioners' were the Plaintiffs in the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida; the Appellees in the District Court of Appeal of Florida, Third District; and the Petitioners in the Supreme Court of Florida. The Respondents,[2] which include the City of Miami Beach and the owners of the Fontainebleau Hotel and the Doral Beach Hotel, were the Defendants-Intervenors in the Circuit Court; the Appellants in the District Court of Appeal of Florida, Third District; and the Respondents in the Supreme Court of Florida.

The symbol "AP" will be utilized to designate the Appendix of the Petitioners and the symbol "AR" will be utilized to designate the Appendix of the Respondents incorporated in this brief.

JURISDICTION

The Petitioners contended before the trial court and the District Court of Appeal, Third District, of Florida that the CARRIAGE HOUSE APARTMENT HOTEL AND YACHT CLUB was a hotel within the meaning of

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[1]The Petitioners include Robert Blum, Robert Rautbord, and Robert L. Turchin, d/b/a The Carriage House Apartment Hotel and Yacht Club.

[2]The Respondents are Howard Kaskel, Doris Kaskel, Carole Schragis and Anita Blum, as the ancillary co-executors of the Estate of Alfred I. Kaskel, deceased, d/b/a Doral Beach Hotel, and the Fontainebleau Hotel Corp., a Florida corporation.

the Zoning Ordinance of the City of Miami Beach, (Ordinance No. 289, AR 5-13), and therefore that it was entitled to the accessory uses[1] allowed and permitted by the Ordinance to hotels of 100 or more guest rooms, but denied to apartment houses or hotels with less than 100 guest rooms. The District Court of Appeal, Third District, of Florida held that the Carriage House was not a hotel consisting of 100 or more guest rooms and therefore it was not entitled to the accessory uses restricted to hotels with 100 or more guest rooms, and further, that the classification between hotels of 100 or more guest rooms and apartment houses and apartment hotels with regard to accessory uses constituted a reasonable classification.

It is, therefore, respectfully submitted that the decision of the Federal question concerning equal protection under the 14th Amendment to the United States Constitution was not necessary to the determination of the cause by the District Court of Appeal, Third District of Florida.

The Florida appellate court held:

> "Although the proceedings have been lengthy and complicated, there is actually only one issue in dispute between the parties, and that issue is whether appellees' apartment hotel is required by law to be treated as a hotel for the purposes of determining whether it may operate service stores, offices, and other accessory uses which oceanfront hotels are permitted to operate in the City of Miami Beach.
>
> • • •

[1]The accessory uses permitted by the Ordinance and desired by the Petitioners consisted of a sundry shop, beauty shop, antique shop, women's dress shop, children's wear shop, men's shop, stockbroker's office and a barber shop.

A study of the arguments of the contending parties reveals a fundamental difference in their approach to the problem. The appellants urge that in determining whether a building is a hotel, an apartment house, or an apartment hotel, the court should be governed by the structure of the building itself. On the other hand, the appellees urge that the determination should be made upon the basis of the valid use being made of the building at the time of the application for accessory uses.

* * *

In light of the definitions contained in Ordinance No. 289 and in Fla. Stat. § 509.242(1)(a)(b), F.S.A. and in view of the fact that the applicability of zoning provisions must have some permanence, we think that the determination of whether a given building is an apartment hotel or a hotel must be made upon the basis of the structure rather than upon changes in the building's use." (AP 14, 17, 20)

Accordingly, this Court lacks jurisdiction of this cause. See: **Lynch v. People of New York, ex rel. Pierson**, 293 U.S. 52, 55 S.Ct. 16; **McGoldrick v. Gulf Oil Corp.** 309 U.S. 2, 60 S.Ct. 375; and **Public Service Commission v. Wisconsin Telephone Company**, 309 U.S. 657, 60 S.Ct. 514.

The Supreme Court of the United States held in **Lynch v. People of New York, ex rel. Pierson**, 293 U.S. 52, 55 S.Ct. 16, at page 17:

[2-4] It is essential to the jurisdiction of this Court in reviewing a decision of a court of a

state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. De Saussure v. Gaillard, 127 U.S. 216, 234, 8 S.Ct. 1053, 32 L.Ed. 125; Johnson v. Risk, 137 U.S. 300, 306, 307, 11 S.Ct. 111, 34 L.Ed. 683; Walter A. Wood Mowing & Reaping Machine Co. v. Skinner, 139 U.S. 293, 295, 297, 11 S.Ct. 528, 35 L.Ed. 193; Eustis v. Bolles, 150 U.S. 361, 366, 367, 14 S.Ct. 131, 37 L.Ed. 1111; Whitney v. California, 274 U.S. 357, 360, 361, 47 S.Ct. 641, 71 L.Ed. 1095; Mellon v. O'Neil, 275 U.S. 212, 214, 48 S.Ct. 62, 72 L.Ed. 245. Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon

*55

which of *two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. Allen v. Arguimbau, 198 U.S. 149, 154, 155, 25 S.Ct. 622, 49 L.Ed. 990; Johnson v. Risk, supra; Walter A. Wood Mowing & Reaping Machine Co. v. Skinner, supra; Consolidated Turnpike Co. v. Norfolk & Ocean View Railway Co., 228 U.S. 596, 599, 33 S.Ct. 605, 57 L.Ed. 982; Cuyahoga Power Co. v. Northern Realty Co., 244 U.S. 300, 302, 304, 37 S.Ct. 643, 61 L.Ed. 1153.

STATEMENT OF THE CASE AND FACTS

On the 5th day of June, 1967, the petitioner, Arthree, Inc. applied for and procured a building permit from the City of Miami Beach. The application of the Petitioners for a building permit described the building to be constructed as follows:

"Description of work to be done:

Temp. permit for apt bldg., 14 sty, 380 units 813,696 sq ft" (AR 1)

On December 21, 1967, the City of Miami Beach issued to Arthree, Inc., its permanent building permit in which the description of the work to be performed is as follows:

"14 Story Apt. Bldg. 390 Units 585 Parking

2-BR - 74 — 141 Bath	Duplex - 26-52 Bath
1-BR & D 54-108 Bath	3 BR - 2 Total 707 Bath
1-BR - 110-250 Bath	Rooms
EFF - 122-135 Bath"	4-BR - 2 21
(AR 3)	

Said building permit further provides:

"... I hereby agree to do the proposed construction in strict conformity with the application and plans and specifications thereof heretofore by me submitted..."

Said apartment building maintains an inner lobby through which all tenants must pass to gain access to the apartments. It is, therefore, an apartment hotel under the definition thereof contained in the Zoning Ordinance:

> "APARTMENT HOTEL: An apartment building, under resident supervision, which maintains an inner lobby through which all tenants must pass to gain access to the apartments and which may furnish dining room service for tenants only." (AR 7)

Certain definitions contained in the Zoning Ordinance are important:

> "DWELLING, TWO-FAMILY: A detached building, divided horizontally or vertically and designed for or occupied by two single-family housekeeping units; contained entirely under one roof and having one dividing partition common to each unit or having the ceiling structure of the lower unit the floor structure of the unit above.
>
> DWELLING, ONE-FAMILY: One or more persons, occupying premises and living as a single housekeeping unit, as distinguished from a group occupying a boarding house, a lodging house or hotel, as herein defined."

Under Section 4-D of the Zoning Ordinance which is applicable to the property involved, it is provided that

the owner of such property may construct "Multiple Family Dwelling or apartments in accord with the area provisions hereinafter defined, and accessory buildings" and may also construct hotels. If a hotel is constructed consisting of more than 100 guest rooms certain service facilities are permitted. A copy of said provision is found at (AR 10-13)

This apartment hotel was named the Carriage House and is situated at 5401 Collins Avenue, Miami Beach, Florida. When completed, the Carriage House had 30 hotel rooms, 117 studio apartments with kitchen facilities, 150 one-bedroom apartments with kitchen facilities, 65 one-bedroom apartments with dens and kitchen facilities, 44 two-bedroom apartments, some with dens, with kitchen facilities, and 5 three-bedroom penthouse apartments with kitchen facilities. Of these, the owners designated as transient accommodations the following: 30 hotel rooms for single or double occupancy; 46 one bedrooms with kitchens (studio apartments); 16 one-bedroom suites with kitchens; 9 two-bedroom suites with kitchens. (Answer to Interrogatories, AR 14) This, they contended gave them a total of 101 hotel units which they also contended qualified them for all the accessory uses permitted in hotels consisting of 100 or more guest rooms as provided by Section 4D of the zoning ordinance. The District Court of Appeal, Third District of Florida held they did not have 100 or more hotel units. (AP 11-22)

REASONS FOR NOT GRANTING WRIT

The United States Supreme Court in the landmark zoning case of **Village of Euclid, Ohio, v. Ambler Realty Co.**, 272 U.S. 365, 47 S.Ct. 114, held that a zoning ordi-

nance must be clearly arbitrary and unreasonable with no substantial relation to public health, safety, morals or general welfare before it can be declared unconstitutional. In the instant case the Petitioners, owners and operators of the Carriage House, contend that they are being discriminated against because there are other properties in the neighborhood with accessory uses which the Carriage House seeks to utilize.

It is respectfully submitted that this argument fails because the neighboring properties permitted to have accessory uses consist of hotels of 100 or more guest rooms. Since the District Court of Appeal, Third District of Florida found, as a matter of law, that the Carriage House is not a hotel of 100 or more guest rooms it is not in the same class as those properties permitted to have certain accessory uses.

A classification based upon hotels as distinguished from apartment hotels is not arbitrary and bears a reasonable relationship to accessory uses. An "apartment hotel" is constructed so as to accommodate permanent resisdents. A "hotel" is constructed so as to accommodate transient guests and therefore requires service facilities and accessory uses to provide its guests the comforts and necessities required by temporary residents away from their permanent residence.

The Court will take judicial notice that there are many common and well-known differences between an apartment house and a hotel. A hotel furnishes and pays for— an apartment does not — electricity, water, room service, maid service, telephone service, porter service, and generally hires living quarters by the day. Due to

greater services required by a hotel, it is obvious that it must have at least two or three times the number of employees required to supervise an apartment hotel. A tenant in an apartment house pays his own electricity, water, phone, expenses of housekeeping and house cleaning, the apartment has space for the storage of food and drinks. Tenants do most of their own cooking and employ their own maids and cooks. Generally they hire their living quarters by the year.

Consequently, due to these differences, the Zoning Ordinance of the City of Miami Beach treats apartment houses as residences for families and hotels as temporary abodes for transients.

The Zoning Ordinance applies to an apartment house a different standard of use than it applies to hotels. In recognition of the needs of a hotel in supplying the services required for the comfort of its patrons, the District Court of Appeal of Florida, Third District, acknowledged the right and power of the City of Miami Beach to apply a different standard of permitted uses to a hotel than those applied to an apartment house. It recognized the distinction between the classes which is obvious to all, and held that the Zoning Ordinance is not unconstitutional as discriminatory or as lacking a logical relationship to the public welfare of the City of Miami Beach. The Court said:

> "... We have previously considered that question and held that there is a reasonable relationship between the public welfare and an ordinance which prohibits service stores in apartment houses."

It is further submitted that the City of Miami Beach is a tourist oriented economy which depends to a large extent on the health of its hotel industry. Even if Section 4D of the Zoning Ordinance of the City of Miami Beach is viewed as giving an economic advantage to hotels, certainly as aforesaid, the classification has a reasonable basis. As the Supreme Court of the United States held in the case of **Dandridge v. Williams**, 397 U.S. 471, 90 S.Ct. 1153, at page 1161:

> [13-15] In the area of economics and social welfare, a State does not violate the Equal Protection Clause merly because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70, 33 S.Ct. 441, 443, 57 L.Ed. 730. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393.

CONCLUSION

It is respectfully submitted that the decision of the alleged Federal question was not necessary to the determination of the cause by the District Court of Appeal, Third District of Florida, and therefore this Court lacks jurisdiction of this cause.

Furthermore, the classification based upon hotels as distinguished from apartment hotels is not arbitrary and bears a reasonable relationship to the need for accessory uses.

WHEREFORE, Respondents pray that this Court decline jurisdiction of this cause.

Respectfully submitted,

MARION E. SIBLEY
and

ALLAN M. GLASER
of the law firm of
SIBLEY, GIBLIN, LEVENSON & WARD
Attorneys for Respondents
Howard Kaskel, Doris Kaskel, Carole Schragis, Anita Blum, as the ancillary co-executors of the Estate of Alfred I. Kaskel, deceased, d/b/a Doral Beach Hotel, and the Fontainebleau Hotel, Corp., a Florida corporation.
605 Lincoln Road, Suite 707
Miami Beach, Florida 33139

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Brief in Opposition to Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District" was mailed to the following:

JOSEPH C. JACOBS and
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Attorneys for Petitioners
and to:
LIONELL BARNET, Assistant City Attorney
and
JOSEPH A. WANICK, City Attorney
1130 Washington Avenue
Miami Beach, Florida 33139
and
HERBERT M. KLEIN
Room 328, Carlton Building
Tallahassee, Florida 32304
Attorneys for Respondents

on this ____ day of _____, 1973.

_____
Attorney for Respondent

COPY BOUND CLOSE IN CENTER

POOR COPY

APPENDIX

CITY OF MIAMI BEACH

APPLICATION FOR BUILDING PERMIT

78395 FEE 26,273.92

Application is hereby made for the approval of the drafted statement of the plans and specifications herewith submitted for the building or other structure hereinafter described. This application is made in compliance and conformity with the Building and Zoning Ordinances of the City of Miami Beach, Florida, which are a part of Ordinance No. 1000 entitled "An Ordinance Regulating and Restricting the Height, Number of Stories and Size of Buildings and Other Structures, the Percentage of Lot That May Be Occupied, the Size of Yards, Courts and Other Open Spaces, the Density of Population, and the Location and Use of Buildings, Structures and Land for Trade, Industry, Residence or Other Purposes in the Municipality of Miami Beach, Florida, Establishing a Board of Adjustment, Providing for the Enforcement of This Ordinance and Prescribing Penalties for the Violation Thereof," passed and adopted January 23, 1929, embracing Ordinance No. 1343 approved September 18, 1929, and Ordinance No. 2110 approved March 7, 1935. The approval of this plan or permit to build on the premises of the Zoning Ordinance of the City of Miami Beach and shall not be construed as relieving or changing in any way the requirements of said Ordinance. All provisions of the Laws of the State of Florida and ordinances of the City of Miami Beach, and all rules and regulations of the Building Department of the City of Miami Beach, must be complied with whether herein mentioned or not.

Miami Beach, Florida 5 June 1967 19

Owner of Building Arthree Inc

Architect M. Grossman Engineer Sloan Engr.

Contractor C. B. L. Turchin Inc

Use	District	New Bldg.	Addition	Remodeling	Repairs	Plan

NO	STREET	PART OF LOT	LOT	BLOCK	SUBDIVISION
5401	COLLINS AVE		29,30,231 12-34		1ST OCEAN FRONT

Foundation	State Hotel Commissioner	Date	Lot Size:

FRONT	DEPTH	HEIGHT	STORIES	TYPE OF CONSTRUCTION	ROOF	BUILDING TO BE USED FOR					OTHER
						RES.	APT.	HOTEL	STORES	ADDITION	

Description of work to be done:

Temp. permit for apt bldg., 14 sty, 380 units 813,696 sq ft

I hereby submit in duplicate, all plans and specifications for said building. In consideration of the issuance to me of the building permit I hereby agree to do the proposed construction in strict conformity with the application and plans and specifications thereof heretofore by me submitted, and in compliance with all provisions of all building laws of the State of Florida, all building ordinances of the City of Miami Beach and all rules and regulations of the building department of the City of Miami Beach.

CONTRACTOR

COUNTY OF DADE
STATE OF FLORIDA SS

Before me, the undersigned authority, a notary public, duly authorized to administer oaths and take acknowledgments, personally appeared _____ to me well known, and who, being first duly sworn, upon oath deposes and says that he is the _____ of the above described building, that he has carefully read the foregoing application, and that he did sign the same, and that all facts therein by him stated are true.

Read and sworn to and subscribed before me, this _____ day of _____, 19____

_____ My Commission expires _____
NOTARY PUBLIC

The foregoing application is hereby approved this _____ day of _____, 19____

_____
BUILDING INSPECTOR

Survey _____
Final Building _____
Final Plumbing _____
Final Electric _____
A. C. _____
Remarks _____

App. 1

COND NO. _____

CITY OF MIAMI BEACH
APPLICATION FOR BUILDING PERMIT

Application is hereby made for the approval of the data and statements of the plans and specifications hereto submitted for the erection, alteration, repair, removal, demolition or conversion of the building or structure hereinafter described, in accordance with the Zoning Ordinance of the City of Miami Beach, Florida, as amended, and the Building Code of the City of Miami Beach, Florida, as amended, and in accordance with the following specifications and the plans submitted herewith, and in accordance with the laws of the State of Florida and the ordinances of the City of Miami Beach, Florida, applicable thereto. All provisions of the laws of the State of Florida and ordinances of the City of Miami Beach, and all rules and regulations of the Building Department of the City of Miami Beach, shall be complied with whether herein specified or not.

See Permit No. 78305 File
79500
See P. 78305

Miami Beach, Florida Dec 21 19 67

Owner of Building Arthrow Inc.

Architect Mel Grossman Engineer Sloan

Contractor R. L. Turchin

Use RE District 71 - 43 New Bldg. X Addition Remodeling Repair Plan

NO	STREET	PART OF LOT	LOT	BLOCK	SUBDIVISION
5401	Collins Ave	~~XXXXXXXXXX~~	29-30-31		First Ocean Front

Foundation Piling State Hotel Commissioner A 11;02 Date 12/7/67 Lot Size: 300 X 473

FRONT	DEPTH	HEIGHT	STORIES	TYPE OF CONSTRUCTION	ROOF	BUILDING TO BE USED FOR					OTHER
						RES.	APT.	HOTEL	STORES	ADDITION	
255	260	160	14	1	Conc		X				

Description of work to be done:

14 Storie Apt. Bldg. 390 Units 585 Parking

2-BR - 74--141 Bath
1-BR & D 54-108 Bath
1-BR - 110-220 Bath
EFF - 122 -135 Bath

Duplex - 26 - 52 Bath
3BR - 2 - Total 707 Bath Rooms
4-BR - 2 - 21

I hereby submit in duplicate, all plans and specifications for said building. In consideration of the issuance to me of the building permit I hereby agree to do the proposed construction in strict conformity with the application and plans and specifications thereof heretofore by me submitted, and in compliance with all provisions of all building laws of the State of Florida, all building ordinances of the City of Miami Beach and all rules and regulations of the building department of the City of Miami Beach.

COUNTY OF DADE
STATE OF FLORIDA ss

Before me, the undersigned authority, a notary public, duly authorized to administer oaths and take acknowledgments, personally appeared _____ to me well known, and who, being first duly sworn, upon oath deposes and says that he is the _____ of the above described building, that he has carefully read the foregoing application, and that he did sign the same, and that all facts therein by him stated are true.

Read and sworn to and subscribed before me, this _____ day of _____, 19____

_____ My Commision expires _____.
NOTARY PUBLIC

CONTRACTOR

The foregoing application is hereby approved this _____ day of _____, 19____

M. Z. Reuben (H.W.)
BUILDING INSPECTOR

Survey _____
Final Building _____
Final Plumbing _____
Final Electric _____
A. C. _____
Remarks _____

App. 39

ORDINANCE NO. 289

Zoning Ordinance of Miami Beach, Florida
Amended as of September 15, 1964

AN ORDINANCE TO REGULATE AND RESTRICT THE ERECTION, RECONSTRUCTION, ALTERATION, LOCATION AND USE OF BUILDINGS, STRUCTURES, LAND AND WATER, FOR TRADE, INDUSTRY, RESIDENCE, OR OTHER PURPOSES; TO REGULATE AND RESTRICT THE SIZE OF BUILDINGS AND OTHER STRUCTURES HEREAFTER ERECTED OR ALTERED, THE SIZE AND DIMENSIONS OF YARDS, COURTS AND OTHER OPEN SPACES SURROUNDING BUILDINGS; TO REGULATE AND RESTRICT BUILDING LINES AND THE PERCENTAGE OF LOT THAT MAY BE OCCUPIED, AND THE DENSITY OF POPULATION, AND FOR SAID PURPOSES TO DIVIDE THE CITY OF MIAMI BEACH INTO DISTRICTS OF SUCH NUMBER, SHAPE AND AREA AS MAY BE DEEMED BEST SUITED TO CARRY OUT THESE REGULATIONS, AND FOR EACH SUCH DISTRICT TO IMPOSE REGULATIONS AND RESTRICTIONS DESIGNATING THE KINDS OR CLASSES OF TRADES, INDUSTRIES, RESIDENCES OR OTHER PURPOSES FOR WHICH BUILDINGS OR OTHER STRUCTURES OR PREMISES MAY BE PERMITTED TO BE ERECTED, ALTERED OR USED; TO PROVIDE A METHOD FOR AMENDMENT, SUPPLEMENT, CHANGE, MODIFICATION AND REPEAL OF REGULATIONS, RESTRICTIONS AND BOUNDARIES; TO PROVIDE A METHOD OF ADMINISTRATION; TO PROVIDE A BOARD OF ADJUSTMENT AND PRESCRIBE ITS POWERS AND DUTIES, AND TO PRE-

SCRIBE PENALTIES FOR THE VIOLATION OF THE PROVISIONS OF THIS ORDINANCE AND ALSO PROVIDE FOR ITS ENFORCEMENT.

WHEREAS, by the provisions of Chapter 9837, No. 719 Special Laws of Florida, 1923, authority is conferred upon the City of Miami Beach to establish districts or zones within its corporate limits for the purpose of regulating the use of land and buildings, the height of buildings, the size of open spaces surrounding buildings and density of population, and

WHEREAS, the City Council of the City of Miami Beach deems it necessary in order to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provisions of transportation, water, sewerage, schools, parks and other public requirements, to make and promulgate such regulations with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout said City in accordance with a comprehensive plan:

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of Miami Beach, Florida:

SECTION 1.

DEFINITIONS: For the purpose of this Ordinance, certain terms and words are herein defined. Words used in

the present tense include the future; the singular number includes the plural, and the plural the singular; the words "used for" include the meaning "designed for"; the word "structure" includes the word "building"; the word shall" is mandatory and not directory; the word "lot" includes the words "plot" and "tract".

ACCESSORY BUILDING: A subordinate building, or portion of the main building, which is located on the same lot as the main building or on an adjacent lot, the use of which building is clearly incidental to the use of the main building.

ACCESSORY USES: Uses customarily incident to the principal uses as permitted, but not including any commercial activity.

ALLEY: Any roadway, place of public way dedicated to public use and twenty (20) feet or less in width, unless otherwise officially designated as a street.

APARTMENT: A dwelling designed for occupancy otherwise than as a one-family dwelling, or a two-family dwelling. The term "Multiple Dwelling" shall be understood to include apartment houses, bungalow courts, and all other family dwellings of similar character, but not to include hotels or apartment hotels.

APARTMENT HOTEL: An apartment building, under resident supervision, which maintains an inner lobby through which all tenants must pass to gain access to the apartments and which may furnish dining room service for tenants only. (427)

BARBECUE STANDS: Any establishment serving foods where provisions are made for customers to drive across the curbs or sidewalk lines and receive service in automobiles or other similar vehicles, and/or establishments where meats are prepared outside of an enclosed building. (477)

BUILDING: Anything constructed or erected, the use of which demands a permanent location on the land; or anything attached to something having a permanent location on the land.

BULKHEAD: See Ordinance 813.

BUNGALOW COURTS: (House Courts): A "Bungalow Court" or "House Court" is a group of two or more single-family dwellings on one or more adjoining lots, having a separate outside entrance on the ground floor level for each single-family dwelling.

CABARET: The term "Cabaret" as used in this ordinance means a place of business, other than a 'night club' or 'extra-hour cabaret' located in a bona fide restaurant, or in a hotel having 100 or more guest rooms, where intoxicating liquor is sold, given away or consumed on the premises, and where entertainment is permitted or provided for guests, in a wholly enclosed, soundproofed, airconditioned room or rooms, between the hours of midnight and 1:00 o'clock A.M. on days other than Sunday, in addition to the hours during which such entertainment is otherwise permitted by ordinance. (1121)

CABARET, EXTRA-HOUR: The term "Extra-Hour Cabaret", as used in this ordinance, means a place of busi-

ness, other than a night club, located in a bona fide restaurant, or in a hotel having one hundred or more guest rooms, where intoxicating liquor is sold, given away or consumed on the premises, and where entertainment is permitted or provided for guests, in a wholly enclosed soundproofed, airconditioned room or rooms between the hours of 1:00 o'clock A.M. and 2:00 o'clock A.M. in addition to the hours during which such entertainment is otherwise permitted by ordinance. (1121)

CLUB CABARET: The term "Club Cabaret" as used in this ordinance, means a place of business, other than a night club, located in a bona fide restaurant, or in a hotel having one hundred or more guest rooms, where intoxicating liquor is sold, given away or consumed on the premises, and where entertainment is permitted or provided for guests, in a wholly enclosed soundproofed, airconditioned room or rooms between the hours of 2:00

* * *

dining rooms, restaurants, coffee shops and other places where food or beverages are served, are operated as accessory uses hereunder, such rooms or places shall be entered only from within the building in the same manner and subject to the same requirements, restrictions and conditions as hereinabove provided for service facilities in hotels with two hundred (200) or more guest rooms, and no sign, advertisement or other appearance or indication of the existence of such accessory use or uses shall be visible at any time or in any manner from any public street, avenue, walk or other public way." (1253) (1400)

SECTION 4-D.

USE REGULATIONS

'REA' Multiple Family District
(1280)

In the "REA" Multiple Family District, no building or land shall be used and no building shall hereafter be erected, constructed, reconstructed or structurally altered which is designed, arranged or intended to be used or occupied for any purpose, unless provided for, except for one or more of the following uses:

1. Any use permitted in the "RDE" Restricted Multiple Family District. (518)

2. Multiple Family Dwellings or apartments in accord with the area provisions hereinafter defined, and accessory buildings.

3. Hotels.

4. Hotels consisting of one hundred (100) or more guest rooms may contain cabarets, club cabaret and the following service facilities, to wit: Dance studios, barber shops, beauty shops, dining rooms, restaurants, coffee shops, tobacco, magazine, newspaper and drug sundry shops, and valet service facilities for guests of the hotel only, and wherein the installation or use of laundry or dry cleaning machinery or equipment shall not be permitted, and massage service facilities, automobile rental subagencies, subject to the same requirements as other

accessory use facilities enumerated in the aforementioned sections, provided that no rental cars be stored on the controlled premises or parking areas of such hotels unless there is a bonafide contract on file at such hotel automobile rental sub-agency as proof that a particular car stored is under hire in that area by a guest of the establishment, and further provided that during such normal parking the rented vehicle may not be serviced with gasoline or oil or repaired in such parking area while awaiting use by the customer, shall be located and conducted entirely within said hotel building in such manner that no sign, advertisement or other appearance or indication of the existence of such cabaret or service facility, nor any activity of whatsoever nature connected therewith shall be visible at any time or in any manner from any public street, avenue, walk or other public way and such cabaret and service facility shall not be accessible to patrons thereof directly from a public street, avenue, walk or other public thoroughfare, nor indirectly by means of any vestibule, foyer, entryway or room, unless such vestibule, foyer, entryway or room is accessible only from the main entrance and main lobby of the hotel, as such entrance or lobby has been designated on plans for the construction or alteration of said hotel building filed with and approved by the Chief Building Inspector, and the door of any emergency exit provided for such cabaret or service facility shall be identified as such exit door by words or letters on the interior thereof only, and such exit shall be kept closed at all times except for emergency use, and the door shall be so constructed, equipped and fitted that no entry into such cabaret or service facility can be

obtained by opening it from the exterior thereof; and provided further that such cabaret or service facility may be accessible to patrons thereof from a patio, yard, court or other open area adjoining the hotel building where such area is enclosed on the side or sides abutting or visible from a public street, avenue or thoroughfare by an opaque wall containing no facilities for entrance into such open area from the exterior of the wall, and any emergency exit door which may be provided in such wall shall be identified as such exit by words or letters on the interior of the exit door only, and such exit door shall not be visible from any public street, way or thoroughfare, and such exit door or doors shall be kept closed and locked at all times except in cases of emergency, and shall be so constructed and equipped that entry into said open area cannot be obtained through said exit by opening the door from the exterior thereof, and provided further that compliance with all requirements, restrictions and conditions herein provided have been certified to by the Chief Building Inspector and that said requirements, restrictions and conditions are maintained at all times; and provided further that proof to the satisfaction of the City Council of the failure by the owner, manager or person in control or custody of the cabaret or service facility or his or its agents or employees to comply with conditions as herein above set forth for the use of said premises shall be sufficient cause for the revocation by the City Council of the license or permit theretofore issued for the said cabaret or service facility or facilities; and provided further that in addition to the penalties provided for in this ordinance for the violation thereof, the

City Council may, in its own discretion, upon the conviction of any person, firm or corporation for the violation of this provision, revoke the license, or permit held by the said person firm or corporation for the cabaret or service facility herein provided for. (1400) (1411) (1518)

5. Accessory uses for tenants only, provided that where dining rooms, restaurants, coffee shops and other places where food or beverages are served, are operated as accessory uses hereunder, such rooms or places shall be entered only from within the building in the same manner and subject to the same requirements, restrictions and conditions as hereinabove provided for service facilities in hotels with one hundred (100) or more guest rooms, and no sign, advertisement or other appearance or indication of the existence of such accessory use or uses shall be visible at any time or in any manner from any public street, avenue, walk or other public way.

6. Apartment hotels—provision for exterior appearances to be the same as provided in Item No. 4 for hotels. (1280)

(R. 250)

"As to Interrogatory No. 3, the category breakdown is as follows:

Hotel Units
30 hotel rooms for single or double occupancy.
46 hotel rooms with kitchen (studios)
16 one-bedroom suites with kitchen
9 two-bedroom suites with kitchen

(This totals 101 hotel units which is one unit more than the number given in the original answer to this interrogatory).

Apartments
76 studio apartments
134-one-bedroom apartments
61 one-bedroom apartments with den
44 two-bedroom apartments (some with dens)
5 penthouse apartments.

(This totals 315 apartment units. The previous answer was 321 units. One of the units originally listed as an apartment unit was added to the transient accommodations. The other five units were in fact studios which had been combined with other apartments to make larger, more deluxe apartments.)

In the

Supreme Court

of the

United States

OCT 2 1973

CASE NO. 73-176

ARTHREE, INC., et al.,

Petitioners,

vs.

HOWARD KASKEL, et al.,

Respondents.

REPLY BRIEF IN RESPONSE TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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MIAMI REVIEW — 371-6880 — 377-3322

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INTRODUCTION

The reply brief is submitted by petitioners in response to certain points raised in the brief in opposition to the petition for writ of certiorari filed on behalf of respondents, Howard Kaskel, et al. In respondents' brief a point was raised suggesting that this court lacks jurisdiction of this appeal because the decision rendered by the District

Court of Appeal, Third District of Florida, was based upon independent state grounds to the extent that a consideration of the federal question was not essential to that court's ruling. This particular point had not been argued before and this brief is submitted pursuant to Rules of the Supreme Court, Rule No. 24-4, which authorizes reply briefs addressed to new issues.

The facts of this case are set out in detail in petitioners' writ of certiorari. Petitioners are the owners of the Carriage House, the status of which is subject of this law suit and appeal and that structure will be referred to by name in this brief.

Citation to the appendix will be by letters "App." and will refer to the appendix contained in petitioners' writ for certiorari previously filed herein.

QUESTION PRESENTED

WHETHER THE DECISION OF THE FLORIDA DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA, WAS BASED ON SUFFICIENT INDEPENDENT STATE GROUNDS.

ARGUMENT

In order to evaluate the decision rendered by the Florida District Court of Appeal, Third District, one must remember that that court was not operating in a vacuum. It had before it litigants who had filed a complaint in the Circuit Court of Florida, Thirteenth Judicial Circuit, which was predicated upon the proposition that section 4-d of

Ordinance No. 289 of the City of Miami Beach discriminated in its impact and application between essentially identical business entities and acted to deprive the petitioners the constitutional safeguards contained in the equal protection and due process clauses of the Fourteenth Amendment. The District Court of Florida was considering an appeal from a decision rendered by the trial court in favor of the petitioners which found that the petitioners:

> . . . does operate a bona fide hotel with all of the services that hotels normally provide to guests, that it always has and does maintain one hundred or more sleeping and guest room accommodations for transients and that it is recognized in the community as a hotel . . . .

The trial court then articulated the basis of their decision:

> It is apparent that the Plaintiffs in the instant case desire only to maintain stores and offices which are the same as the stores and offices maintained and permitted to be maintained, in the buildings of their immediate neighbors such as the Doral Beach Hotel, the Fountainebleau Hotel, and the others mentioned. Section 4-d of City of Miami Beach ordinance number 289 attempts to restrict the use of the premises of these Plaintiffs so as to prevent them from using them in a manner similar to the uses of their immediate neighbors, and, therefore, it is unreasonable, arbitrary, confiscatory and unconstitutional insofar as its application to these Plaintiffs is concerned. (App. 3, 5)

It was upon the foundation of the issues presented to the trial court and the opinion rendered by that tribunal that the appeal was presented to the District Court of Appeal, Third District of Florida. An examination of the District Court's holding leads to the compelling conclusion that their decision stands as a statement condoning an invidious form of economic discrimination and constitutes an abridgment of the petitioners' constitutional rights and is unsupported by a sufficient independent state grounds.

Petitioners suggest that a consideration of sufficient independent state grounds is properly controlled by the judicial principles enunciated by this court in the case of *Enterprises Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157; 375 Ct. 318; 61 L.Ed. 644 (1916), wherein the court stated at page 164 that:

> . . . But where the non-Federal ground is so interwoven with the other (independent state grounds) as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain. . . . (Parenthetical supplied)

Respondents correctly state in their brief at page 3 that the only issue before the District Court of Appeal, Third District of Florida, was whether the petitioners were required by law to be treated as a hotel. Respondents seek to divest this Court of jurisdiction of this appeal on the grounds that a determination of the status of the Carriage House as a hotel was resolved by the application of a definitional standard. An examination of the opinion of the District Court of Appeal reveals the error of this interpretation. The District Court of Appeal recognized

that the Carriage House operated as a bona fide hotel; it conceded that the City of Miami Beach and the State of Florida had on numerous occasions affirmed the status of the Carriage House as a hotel; and it acknowledged that the Carriage House was recognized in the community as a hotel (App. 16, 17, 21). In spite of the compelling conclusions to be drawn from these findings the District Court of Appeal held that the petitioners were not operating a hotel because it had originally been conceived and constructed primarily as an apartment building with a few hotel rooms and that regardless of bona fide use being made of the physical structure that:

> . . . the determination of whether a given building is an apartment hotel or a hotel must be made upon the basis of the structure rather than upon changes in the building's use. (App. 20)

This holding renders the opinion arbitrary on its very face. This is not the act of a court merely applying a definition to arrive at a conclusion. This decision holds that a viable distinction can be made between similarly composed and competing business enterprises based on the physical structure housing their activities to the exclusion of an analysis of the current bona fide functions and activities being conducted in that structural shell. This conclusion lies at the heart of the petitioners' insistence that the failure to classify the Carriage House as a hotel for the purpose of allowing it to compete on an equal footing with other area hotels is a patent violation of the equal protection and due process standards contained in the Fourteenth Amendment and is totally unsupported by independent state grounds.

This misapplication of legal principles is amply summarized by the over-worked analogy "you can stamp C-O-W on a horse, but that does not make the horse a cow." Quite obviously, if the Carriage House is operating a bona fide hotel with all of the services, bookkeeping procedures, registration requirements and all other activities normally associated with hotel management then the act of labeling it something other than a hotel constitutes an exercise in fundamental discrimination.

CONCLUSION

The decision rendered by the District Court of Appeals, Third District of Florida, which purported to determine the status of the Carriage House in relation to adjacent competing hotels which was justified by that court upon an analysis of the physical structure housing the business enterprise is not a decision predicated upon sufficient independent state grounds so as to divest this court of jurisdiction.

Respectfully submitted,

JOSEPH C. JACOBS

and

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief in Response to Respondents' Brief in Opposition to Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District, has been served upon each of the following:

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JOSEPH A. WANICK
City Attorney
City of Miami Beach
Miami Beach, Florida

attorneys for respondents, by mail, this _____ day of _____, 1973.

_____
Attorney for Petitioners